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No. 87-2077

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

PETER M. STERN,

Petitioner

v.

HONORABLE ROBERT N.C. NIX, JR.
Individually and as Chief Justice
of the Supreme Court of Pennsylvania,
HONORABLE ROLF LARSEN,
HONORABLE JAMES T. MCDERMOTT,
HONORABLE WILLIAM D. HUTCHINSON,
HONORABLE STEPHEN A. ZAPPALA and
HONORABLE NICHOLAS P. PAPADAKOS,
Individually and as Justices of the
Supreme Court of Pennsylvania,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Chief Justice and Justices of the Supreme Court of the United States:

Your Respondents, the Chief Justice and Justices of the Supreme Court of Pennsylvania respectfully request that the Petition for Writ of Certiorari be denied and offer as reasons therefor, the following:

COUNTER-STATEMENT OF THE CASE

Petitioner Stern ("Stern") is an attorney who was admitted to the Supreme Court of Pennsylvania in 1966. On June 3, 1987, Stern was disbarred by the Supreme Court of Pennsylvania (J.A.574).[1] The disbarment proceedings arose out of an incident which occurred in 1980. At the time of the events, Stern was a partner in the law firm of Blank, Rome, Comisky and McCauley and had been since 1972. Stern was responsible for some of the firm's most significant labor clients, including numerous clients in the food and paper converting industries. One of its largest clients was the Frankford Quaker Grocery Company, ("Frankford Quaker"). (J.A.574). Frankford Quaker was experiencing financial problems and was seeking cooperation from Teamsters Union, Local 500 which represented its employees. (J.A.213). The President of the union was named William O'Farrell ("O'Farrell"). (J.A.575). After "conventional methods" of seeking the union's compliance with the collective bargaining agreement had failed, officers of Frankford Quaker pressured Stern to "carry" from them to O'Farrell the sum of $5,000 in cash. (J.A.575). While Stern initially refused to "carry" the $5,000 to the union leader because it was his opinion that it would be an illegal "pay off", (J.A.248), he eventually acceded to his client's demands on pain of dismissal as its attorney and twice "carried" the $5,000 to O'Farrell as Frankford Quaker's "courier", (J.A.465), to see if paying him would "soften his attitude." (J.A.519). The first attempt to deliver failed because O'Farrell told Stern he would not do anything against the interest of those he represented in exchange for it. (J.A.465). Not to be denied, Stern

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1. The references to Joint Appendix (J.A.) refer to the joint appendix filed in the United States Court of Appeals for the Third Circuit in this matter under Federal Rule of Appellate Procedure 30.

took the cash back to O'Farrell, this time "couched" as a Christmas gift. (J.A.522). O'Farrell took it. (J.A.466).

Stern testified that O'Farrell said "If it's a gift, I'll take a gift. That's what happened [here]." (J.A.523). In point of fact, the only reason Stern remembered it was at Christmas time when he re-delivered the cash was that his clients "couched it in terms of a Christmas gift." (J.A.522).

Sometime later, O'Farrell made a demand to Stern that another of Stern's clients, Data File, Inc., pay him a $15,000 bribe to prevent or stop a plant organization effort by O'Farrell's union. (Stern's Third Circuit Brief at p.5). This time Stern refused to go along.

On January 14, 1985, the Disciplinary Counsel[2] filed a petition for discipline against Stern charging him with violations of Pennsylvania Rules of Disciplinary Enforcement ("Pa.R.D.E.") 1-102 (A) (3), (4) and (6) and Pa.R.D.E. 7-102 (A) (7). Stern and Disciplinary Counsel thereafter entered into a comprehensive stipulation of facts including Stern's acknowledgment that he violated Pa.R.D.E. 7-102 (A) (7) which prohibits a lawyer from counseling or assisting clients in conduct the lawyer knows to be illegal or fraudulent. (J.A.159). An evidentiary hearing was held before a Hearing Committee of the Disciplinary Board of the Supreme Court of Pennsylvania on September 26, 1985. The Hearing Committee filed its report on February 27, 1986, recommending dismissal of the charges based on Pa.R.D.E. 1-102 (A) (3), (4) and (6) and recommending private informal admonition, or at most private reprimand. (J.A.178).

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2. The Disciplinary Counsel is appointed by the Disciplinary Board of the Supreme Court of Pennsylvania. The powers, duties and functions of both the Board and Disciplinary Counsel are set forth in the Pennsylvania Rules of Disciplinary Enforcement promulgated by the Supreme Court of Pennsylvania in the exercise of its inherent and exclusive power to supervise the conduct of attorneys who are its officers.

On July 7, 1986, after reviewing the recommendation, the findings of fact and conclusions of law of the Hearing Committee, and the record and the briefs of the respective parties, the Disciplinary Board concluded that the appropriate sanction in this matter was public censure. (J.A.196). Said the Disciplinary Board:

> We find it somewhat incredulous that a company having labor problems would clandestinely deliver $5,000 through its attorney [Stern] to the president of its union with no hope or expectation of influence. However, the decision in this matter is not dependent upon the finding of the Hearing Committee that Respondent and his client were actuated solely by altruism. Regardless of Respondent's [Stern's] motivation, there is no doubt that Respondent knowingly delivered the questioned payment. Whether or not the payment was a bribe or a gift, it violated the law. Clearly, Respondent committed, and then concealed the commission of, the act of making an illegal payment to a union official. The issue then remains whether or not the Hearing Committee erred by dismissing the remaining charges. Respondent had admitted that he counseled and assisted his client in conduct that he knew to be illegal or fraudulent and in violation of DR 1-102 (A) (7).
>
> We would have no difficulty as a fact finder in concluding that Respondent, by his conduct, clearly violated Disciplinary Rules DR 102(A) (3) (4) and (6) in that his conduct was illegal and involved moral turpitude and/or was dishonest and involved fraud, deceit and misrepresentation which reflected on his fitness to practice law. However, it is also unnecessary to decide each of these matters in order to properly frame the decision here. The actual controversy lies in whether or not Respondent should be subject to public discipline despite the

> fact that all parties concede that this matter and his subsequent testimony against O'Farrell have caused him a great deal of professional, personal and economic hardship.
>
> The Hearing Committee recommended that the devastation to Respondent's professional life is such that no further public punishment is warranted. Disciplinary Counsel considered "respondent's evidence of excellent reputation, cooperation with the federal authorities and hardship caused by loss of stature and income and family distress" as factors which caused it not to recommend more serious discipline than Public Censure. Cf. Brief on Exceptions, p 27. The matter of Respondent's transgressions and his dealings with O'Farrell are matters obviously within the public domain. Private punishment of a highly publicized matter that involved a clear violation of law is unwarranted. To the extent that the disciplinary system seeks to maintain the integrity of the bar and judicial process and the confidence of the public in both, informal or private sanctions are inappropriate for an attorney who has knowingly committed a public offense involving violations of an anti-corruption penal statute.

(J.A.202-03).

On October 9, 1987, the Supreme Court of Pennsylvania entered a rule upon Stern to show cause why he should not be disbarred. (J.A.207). On November 3, 1986, Stern requested an oral argument and a second evidentiary hearing. On November 10, 1986, the Supreme Court granted Stern's request for oral argument but denied a second evidentiary hearing. Oral argument was held on January 29, 1987. On June 3, 1987, the Supreme Court issued an Opinion and Order disbarring Stern.

On June 17, 1987, Stern filed the action, out of which his Petition arises, in the federal district court seeking to permanently enjoin his disbarment on the grounds that the Supreme Court had substituted its judgment on matters of credibility for that of the Hearing Committee pursuant to alleged general rules and procedures promulgated and applied by the State Supreme Court. These general rules and procedures have never been cited to nor proven to exist in the proceedings below.

The Honorable Marvin Katz of the federal trial court below entered judgment in favor of the State Supreme Court because on review of the record of the disciplinary proceedings it was his finding that the State Supreme Court had in fact not substituted its judgment on matters of credibility. (J.A.612-17). The trial court, before proceeding to enter judgment, denied the State Supreme Court's motion to dismiss on grounds of, *inter alia*, lack of subject matter jurisdiction and claim and issue preclusion. On Petitioner's appeal, the court of appeals held that under the *Rooker-Feldman* doctrine, the district court lacked subject matter jurisdiction and entered a judgment that the district court judgment be vacated and remanded with instructions to dismiss the complaint.

SUMMARY OF ARGUMENT

The Petitioner rests his case on the false premise that the Respondent State Supreme Court has general rules promulgated in a non-judicial proceeding which permit or a scheme of attorney discipline which permits the State Supreme Court to, without viewing witnesses, substitute its judgment for that of a fact finder on matters of pure credibility. Firstly, there are no such rules and there is no such scheme. Indeed, the State Supreme Court has held that, "It is a basic tenet of our system of jurisprudence that issues of credibility are

properly left to the trier of fact for resolution." Secondly, there was, in Stern's disbarment proceeding, no substitution of judgment on a credibility issue. Thirdly, under its plenary authority, the State Supreme Court has the power to hear evidence *de novo* if appropriate. Finally, Petitioner sought below to permanently enjoin his disbarment which had taken place. His federal complaint and other papers filed with the courts below contain copious detail of evidence which Stern presented to pursuade the trial court that the State Supreme Court had erred in disbarring him. His case against the Respondent is inextricably intertwined with a judicial decision which did not reverse existing law or create new rules or procedures. There was, therefore, no subject matter jurisdiction under the *Rooker - Feldman* doctrine and the Third Circuit Court of Appeals was correct in ordering that Stern's case be dismissed.

REASONS FOR DENYING THE WRIT

1. There is no case or controversy because the Respondent Supreme Court's decision to disbar Petitioner Stern was not grounded in a rejection of the Hearing Committee's credibility determination which the Supreme Court would have accepted had Stern been provided with a second evidentiary hearing.

Stern rested his entire claim that the State Supreme Court substituted its judgment for the Hearing Committee's on the matter of his credibility on the following language contained in the Hearing Committee report:

> 6.2. On the second occasion when Respondent [Stern] proffered and O'Farrell accepted the $5,000, Respondent [Stern] did not expect or intend that O'Farrell would be influenced in respect to any of his actions, decisions, or duties as a representative of Frankford Quaker employees.

(J.A.188)

Of course, Stern missed the point because *his client expected and intended to influence O'Farrell and Stern knew it.* As the Hearing Committee stated, it is the payor's intent that governs. Thus, when the State Supreme Court concluded that the cash payment of $5,000 was intended to influence, it did not do so by simply disbelieving Stern. The most that can be said of Stern is that he did not believe his client's plan would work.

The fact that Stern may have believed the $5,000 would only amount to a gratuity is of no moment. Section 302 of the Labor Management Relation Act, 29 U.S.C. § 186, is "a criminal provision, malum prohibitum, which outlaws all payments, with states exceptions, between employer and representative." *United States v. Ryan*, 350 U.S. 299, 305 (1956).

As the Report of the Disciplinary Board stated when reviewing the Hearing Committee's Recommendation, "We find it somewhat incredulous that a company having labor problems would clandestinely deliver $5,000 through its attorney to the president of its union with no hope of expectation of influence." (J.A.202). The trial court below readily perceived the fault in Stern's logic and readily perceived that Stern knew what his client intended and expected. (J.A.615-16). An examination of the Opinion of the State Supreme Court demonstrates that it concluded that Stern knew that his client did not intend the payment to be a mere gift. (J.A.652-53; Petitioner's Appendix: A.39-43). Thus, when the State Supreme Court stated that it was clear that the purpose of the payment to O'Farrell was to influence him in his capacity as President of Local 500 and that Stern was well aware of that fact, it did not have to disbelieve Stern's self-serving testimony as to his intent vis à vis O'Farrell. The State Supreme court focused on Stern's appreciation of the character of the transaction and not whether he personally expected or intended O'Farrell to be influenced based on O'Farrell's previous declaration that he could not be (which in and

of itself is patently absurd since he asked Stern for a $15,000 bribe thereafter and Stern did not request the $5,000 "gift" back realizing, as he must have, that it had been taken for a bribe). The State Supreme Court concluded that Stern facilitated an attempt by Frankford Quaker to bribe O'Farrell and that Stern knew such a payment would be illegal. (J.A.654).

Petitioner's reliance on the Hearing Committee's finding that the "payor's (i.e. Respondent [Stern] and/or his client's) intent was to make a gift and not buy a result," (J.A.189), is ill-founded, because firstly, Stern testified that his client "couched" the cash as a "gift" and this was Stern's sole evidence of his client's intent. Secondly, where evidence offered to support a result is so unreliable and/or contradictory as to make the result based on pure conjecture, a finder of fact may not be permitted to return such a finding. *See Commonwealth v. Faraquharson*, 467 Pa. 50, 60, 354 A.2d 545, 550 (1976). Thus, while the State Supreme Court adheres to the principle that it will not substitute its judgment for that of the finder of fact, *Commonwealth v. Woodhouse*, 401 Pa. 242, 261, 164 A.2d 98 (1960), for to do so would require an assessment of the credibility of the testimony that is clearly not its function as it has stated, *Commonwealth v. Sullivan*, 436 Pa. 450, 456, 263 A.2d 734 (1970), *cert. denied*, 400 U.S. 882 (1970), this concept must be distinguished from an equally fundamental principle that a result may not be based on surmise or conjecture. *See Commonwealth v. Stanley*, 453 Pa. 467, 309 A.2d 408 (1973). In other words, while credibility is within the province of the finder of fact, the finder is not free to ignore overwhelming evidence in favor of a contrary result not supported by the evidence.

In Stern's case, the Hearing Committee's conclusion as to his client's intent simply was not supported by any competent evidence of record which a reasonable judicial mind could find as supportive of the determination made by the finder of fact. The State Supreme Court

has stated that it is axiomatic that great deference is to be given a finder of fact whose province it is to pass on the credibility or witnesses but that this deference does not extend so far as to allow a finder of fact to base its decision on speculation derived from testimony which it finds credible, *Commonwealth v. Iannaccio*, 505 Pa. 414, 480 A.2d 966 (1984), and findings of fact will be overturned if they are arbitrary and capricious. *See Kay v. Kay*, 560 Pa. 680, 334 A.2d 585 (1975)

Of course the State Supreme Court *could have* rejected (but did not) the Hearing Committee's finding that Stern did not expect or intend O'Farrell to be improperly influenced if it had chosen to focus not upon his client's intent, and his knowledge thereof, but instead on Stern's actual intent. This Court stated in *United States v. Raddatz*, 447 U.S. 667 (1980), a case upon which Stern so heavily relies, that:

> Here [the] District Judge was faced with a transcript that contained two irreconcilable accounts of critical facts. Neither version was instrincally incredible or, for that matter, less plausible on its face than the other. Moreover, there was in the record no evidence inherently more trustworthy than supported by human recollection. *In these circumstances*, the District Judge could not make the statutorily mandated "de novo determination" without being exposed to the one kind of evidence that no written record can ever reveal—the demeanor of the witnesses. (emphasis supplied).

Id. at 691.

As has been observed above, the State Supreme Court does not substitute its judgment on credibility matters when there is sufficient evidence to support the conclusion of the fact finder. However, wrongful intent may be inferred from circumstantial evidence despite self-serving testimony. *State of Nebraska v. Coburn*, 452 N.W.2d 605 (Neb. 1984) (intent sufficient to support a

conviction for burglary may be inferred from facts and circumstances surrounding illegal entry, if those facts and circumstances are of such a nature as to present a jury question as to defendant's intent even if defendant has offered self-serving testimony). And in fact, circumstantial evidence may be more reliable than self-serving declarations. *Matsushita v. United States*, 750 F.2d 927, 934 (C.A.F.C. 1984). As the State Supreme Court stated, "The impact of [Stern's] self-serving testimony with regard to *his* intent as to the effect of the payment pales before the overwhelming evidence to the contrary." (J.A.653-54).

2. There is no case or controversy because the Respondent Supreme Court does not have a general rule promulgated either administratively or by way of judicial decision which permits it to substitute its judgment on credibility matters for that of the fact finder. Indeed, it has established positive law to the contrary.

The law in Pennsylvania with respect to *de novo* review of attorney discipline matters provides that the State Supreme Court is not bound by the findings of the trier of fact below but is free to evaluate for itself the evidence presented to the Disciplinary Board's Hearing Committee. However, credibility is an issue particularly within the province of the trier who views the testifying witness. *Office of Disciplinary Counsel v. Campbell*, 463 Pa. 472, 345 A.2d 616 (1975), *cert. denied*, 424 U.S. 926 (1975). On matters of credibility, the State Supreme Court will not substitute its judgment for that of a finder of fact when there is sufficient evidence to support his conclusions. *Com. ex rel. Alexander v. Alexander*, 445 Pa. 406, 411, 284, A.2d 721 (1971). Stern failed to apprise the trial court of this legal authority contradicting his theory that the State Supreme Court has a rule or disciplinary scheme permitting substitution of judgment on matters of credibility. And although the Respondents

referred Stern to this decisional law at the trial level, at the appellate level he again ignored this legal authority. When confronted with questioning by the appeals panel, Stern took the position that the State Supreme Court in deciding his case had in fact overruled this law and promulgated new law permitting the alleged substitution of judgment. An examination of the State Supreme Court's opinion does not reveal a declaration of law contrary to the holdings in *Campbell* and *Alexander*.

Indeed, the Respondent has declared that, "It is a basic tenet of our system of jurisprudence that issues of credibility are properly left to the trier of fact for resolution." *Commonwealth v. Whack*, 482 Pa. 137, 140 393 A.2d 417, 419 (1978).

In short, Petitioner is attempting to couch alleged judicial error as, or as akin to, an administrative promulgation of a new general rule. As has been heretofore observed, the State Supreme Court's Opinion reveals no promulgation of a new general rule overruling prior case law. But even accepting arguendo Petitioner's characterization, there is no subject matter jurisdiction, for as the court stated in *Zimmerman v. Grievance Com. of Fifth Jud. Dist.*, 726 F.2d 85 (2nd Cir. 1984), *cert. denied*, 467 U.S. 1227 (1984):

> It is possible that a state court could combine in a single opinion an ajudication of a grievance complaint with a promulgation of what amounts to a new rule. Of course, every application of a rule to the facts of a particular case results in some "new" refinement of the rule, and *Feldman* cannot be circumvented by characterizing all of constructions of a rule as promulgation of new rules. Thus, when Zimmerman challenges the . . . decision because it construed the . . . rule's ban . . . he is complaining about a construction of the rule given . . . and *Feldman* limits his challenge . . . to review in the Supreme Court.

Id. at 87.

3. There is no federal subject matter jurisdiction over this matter which seeks or requires review of the final judgment of the highest court in the State entered in a judicial proceeding.

The case of *Dist. Col. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), holds that while a district court has subject matter jurisdiction over general challenges to state attorney disciplinary rules promulgated by state courts in non-judicial proceedings, jurisdiction is lacking when the case requires review of a final state judgment in a particular case. *Feldman*, while relegating constitutional claims that are "inextricably intertwined" with the state's regulation of its attorneys to the state courts, 460 U.S. at 482-83 n.16, continues to allow district courts to exercise jurisdiction over "general challenges to state bar rules promulgated by state courts in non-judicial proceedings, which do not require review to final state-court judgment in a particular case." 460 U.S. at 486.

It is of no moment that the challenge to the state court decision alleges that the state court's action was unconstitutional. *Feldman*, 460 U.S. at 486. The distinction "between general challenges to state bar rules as promulgated and challenges to [what amounts to] state decisions in particular cases . . . is often difficult to draw." *Razatos v. Colorado Supreme Court*, 746 F.2d 1429, 1433 (10th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985); *Rogers v. Supreme Court of Virginia*, 590 F.Supp. 102, 104-108 (E.D. Va. 1984). However, in Stern's case, it is clear on which side of the line the matter falls because the district court was required to review the allegations underlying the state judicial decision in order to address the federal constitutional issues. This evidences the fact that jurisdiction was lacking. *Robinson v. Ariyoshi*, 753 F.2d 1468, 1471-72 (9th Cir. 1985). The rationale for this rule is that state courts are as competent as federal courts to decide

federal constitutional issues. *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (stating that nothing in the legislative history of §1983 supports the argument that a person claiming a federal right should have an unrestricted opportunity to relitigate in federal court issues already decided in state court; state courts have an obligation and ability to uphold federal law); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (rejecting the argument that "state judges will not be faithful to their constitutional responsibilities").

In addition, any other rule would result in a waste of judicial resources and unnecessary friction between state and federal courts. *See Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 286 (1970) (lower federal courts may not sit in review of state court's decisions); *Texaco v. Pennzoil Co.*, 748 F.2d 1133, 1142 (2nd Cir. 1986). The *Razatos* court concluded that claims are "inextricably interwined" if the district court must "scrutinize not only the challenge rule itself, but the [state court's] application of the rule. . . ." If in order to resolve the claim, "the district court would have to go beyond mere review of a state rule as promulgated, to an examination of the rule as applied by the state court to the particular factual circumstances of [the plaintiff's] case," the court lacks jurisdiction. *See also Brown v. Board of Bar Examiners*, 623 F.2d 605, 610 (9th Cir. 1980) (because the plaintiff's complaint and requested relief involved an application of the challenged rule to his particular case, and would require a review of the state court decision, the court concluded it lacked jurisdiction); *Czura v. Supreme Court of South Carolina*, 623 F.Supp. 267, 270 (D.S.C. 1986) (same.) Stern has attempted to circumvent this body of law by couching his cause as a challenge to general rules promulgated in non-judicial proceedings. The Third Circuit Court of Appeals while at first mystified as to what these rules were, gleaned from the record two state court rules which seemed to be the subject matter of Petitioner's

suit: (1) the court-made rule that review of attorney discipline hearings by the State Supreme Court is *de novo* and (2) the Pennsylvania Rule of Disciplinary Enforcement that provides for oral argument but not a second evidentiary hearing before the court. (Petitioner's Appendix: A.15-16). These two rules taken together, the court concluded, allow the State Supreme Court to reject the findings of the Hearing Committee and the Disciplinary Board without affording the attorney an evidentiary hearing before it. The court improperly concluded that this resultant rule was what Stern was purportedly challenging. Instead, Stern was purportedly challenging an alleged substitution of judgment on credibility issues by the State Supreme Court for that of the Hearing Committee; the substitution allegedly taking place in the judicial decision making process. As has been observed elsewhere in this Brief, such a substitution did not occur. And there is no rule or scheme which would allow it to occur. Such a substitution would be in contravention of jurisprudential policy as declared by the Respondent Court, and were it to occur, it would be judicial error.

In the final analysis, the district court was required to review the state court judicial decision and not a rule and the appeals court was correct in concluding that there was "inextricable intertwining" of the challenge and the final state court judgment.

As Justice Marshall stated in his concurring opinion in *Pennzoil v. Texaco, Inc.*, 481 U.S. _____, 95 L.Ed.2d 1, 109 S.Ct. 1519 (1987).

> [I]t is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal court claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal

proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Id. 95 L.Ed.2d at 25.

The Fifth Circuit Court of Appeals has observed that alleged errors committed by state judges in state court are for correction in the state court system (and inevitably by the United States Supreme Court). *Brinkman v. Johnston*, 793 F.2d 111 (5th Cir. 1986). Stern waived his appellate rights and he is simply attempting to circumvent his waiver by circumventing the *Feldman* doctrine with a nominally facial challenge in fact seeking review of a particular state court determination. *See Reed v. Terrell*, 759 F.2d 472 (5th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985) *Zimmerman v. Grievance Com. of Fifth Jud. Dist.*, 726 F.2d 85 (2nd Cir. 1984), *cert. denied*, 467 U.S. 1227 (1984); *Randolph v. Lipscher*, 641 F.Supp. 767 (D.N.J. 1986) *Rosquist v. Jarrat Construction Corp.*, 570 F.Supp. 1206 (D.N.J. 1983).

4. As a matter of law, the Supreme Court's procedures are lawful.

In the case of *Razatos v. Colorado Supreme Court*, 746 F.2d 1429 (10th Cir. 1984), an attorney suspended from practice by the Colorado Supreme Court brought a §1983 action seeking a declaratory judgment that the Colorado procedure for disciplining attorneys violated the Due Process Clause of the Fourteenth Amendment and a hearing clearing his name. (This is in sharp contrast to Stern who requested that the State Supreme Court be permanently enjoined from disbarring him). The *Razatos* plaintiff asserted that under the Colorado attorney disciplinary scheme the Colorado Supreme Court makes the final fact determination as to whether an attorney should be disciplined. He argued that this scheme violates the Fourteenth Amendment because due process requires that a personal hearing be held before a final decision maker. Razatos claimed that if the

Colorado Supreme Court has the discretionary power to hold de novo hearings, its failure to provide one when issues of credibility are crucial violates an accused attorney's right to have the final decision maker actually hear the challenged testimony. The Tenth Circuit Court of Appeals analyzed the claim in light of the holding of *United States v. Raddatz*, 447 U.S. 667 (1980), in concluding that Razato's rights were not violated. Stern does not take a position on whether the Supreme Court may or may not conduct hearings when appropriate however, the State Supreme Court's authority under the Pennsylvania Constitution is plenary as is the authority of the Colorado Supreme Court's. Pennsylvania Rule of Disciplinary Enforcement 103. Said the *Razatos* court, "We hold . . . that the Colorado attorney disciplinary scheme affords sufficient procedural safeguards to alert the Supreme Court to instances when it should exercise its discretion to conduct a de novo hearing and view the witnesses itself." No less can be said of Pennsylvania's procedures which are identical.

CONCLUSION

For the above stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the Bar of the United States Supreme Court.

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